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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GRANADA WINES, INC.,

Appellant

v.

NEW ENGLAND TEAMSTERS AND
TRUCKING INDUSTRY PENSION FUND,

Appellee

No. 84-1518

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FOR THE FIRST CIRCUIT
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ON APPEAL FROM THE ORDER OF
THE DISTRICT COURT (DATED MAY 17, 1984)
IN BANKRUPTCY APPEAL NO. 83-0417-MC

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT OF ISSUES

1. Does the requirement of the Multiemployer Pension Plan Amendments Act that Granada pay a portion of the under-funded condition of a pension plan constitute a taking of property impermissible under the Fifth Amendment to the Constitution of the United States where Granda was did not create, control or manage the plan, was not responsible for the under-funded condition of the plan and was party to a contract which did not impose upon it any such liability?

2. Does the Bankruptcy Code and the Congressional policy reflected therein in favor of reorganizations require that the

Pension Fund's claim against Granada on account of withdrawal liability be treated under Granada's Plan of Reorganization on the same basis as it would be treated in a liquidation of Granada under Chapter 7 where Granada is insolvent, the stockholders recover nothing under the Plan, and the value of Granada's assets alone is insufficient to permit payment of a 100% dividend on the claims of its unsecured creditors?

3. Where Granada is insolvent and its Plan of Reorganization provides for the prompt distribution to its creditors of dividends aggregating more than the value of its assets, provides nothing for its stockholders and contemplates that it is to emerge from bankruptcy proceedings with but a few employees and with assets resulting from the infusion of new capital by its new stockholder, has Granada, in effect, undergone such a liquidation as warrants the payment, under §4225(b) of ERISA, of a dividend on only one-half of the Pension Fund's claim for withdrawal liability?

4. Did the District Court err as matter of law in not holding that, since the Granada Plan of Reorganization treats the withdrawal liability of the Pension Fund as a separate class, does not unfairly discriminate against it, and is fair and equitable, the Plan may provide for payment of a dividend on only one-half of the Pension Fund's allowed claim pursuant to §1129(b) of the Bankruptcy Code?

STATEMENT OF THE CASE

1. Nature of the Case

This is an appeal by Granada Wines, Inc., Debtor in the Chapter 11 proceedings below ("Granada"), from the Memorandum and Order (App. p. 6)¹ of the District Court, dated May 17, 1984, in Bankruptcy Appeal No. 83-0417-Mc affirming the Order of the Bankruptcy Court contained in its Memorandum On Objection Of New England Teamsters & Trucking Industry Pension Fund To Confirmation Of Amended Plan Of Reorganization dated January 7, 1983 (App. p. 144). For the reasons set forth in that Memorandum (the "Memorandum"), the Bankruptcy Court ordered that under Granada's Amended Plan of Reorganization dated October 26, 1982 (the "Plan"), the New England Teamsters & Trucking Industry Pension Fund (the "Pension Fund") was entitled to receive the same percentage distribution on its claim in respect of withdrawal liability as the distributions to be made in respect of the claims of general unsecured creditors.

2. Prior Proceedings and Facts

On April 1, 1982 Granada filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Prior thereto Granada was a distributor of alcoholic beverages, primarily wines (D.S. p.3; App. p. 27)². During the course of the proceedings, however,

¹ App. refers to the Appellant's Appendix filed herewith.

² D.S. refers to the Amended Disclosure Statement (as supplemented by the Addendum thereto) included in the record on this Appeal.

it was unable to conduct normal business operations because of the unavailability of appropriate financing. Its post-petition business activities consisted primarily of collecting its receivables and engaging in a very limited number of purchases and sales. Prior to the commencement of the proceedings it had terminated all of its salesmen and truckers and all but one of its warehousemen. During the proceedings, it employed only its chief executive officer, a secretary, an auditor and a warehouseman (D.S., p. 6; App. p. 30), all of whom subsequently left its employ. The termination of its salesmen and truckers, who were covered by collective bargaining agreements with the Teamsters Union, gave rise to the pre-petition claim for withdrawal liability in the amount of \$248,614 by the Pension Fund to which Granada was obligated to make contributions under collective bargaining agreements. Generally, the withdrawal liability claim is a claim asserted under the Multi-Employer Pension Plan Amendments Act (PL 96-364) ("MPPAA"), amending the Employee Retirement Income Security Act of 1974 ("ERISA"), for Granada's allocable share of the amount by which the Pension Fund, which was not controlled, managed or created by Granada, is under-funded.

In the course of the proceedings it became apparent that Granada was not capable of reorganization on a "stand alone" or independent basis. Even if it could retain its product lines, principally from wineries such as Almaden Vineyards Inc. ("Almaden"), those product lines were limited and Granada was no longer the

exclusive marketer of the products it distributed. Its volume of sales in the recent pre-petition past and its likely volume of sales in the immediate future were not sufficient to cover the costs of its own marketing, warehouse, distribution and administrative staff. The company was insolvent (Tr., pp. 28 - 43 and 46 - 51; App. pp. 119-134 and 137-142; Findings and Order Confirming Plan of Reorganization, p. 3; App. p. 89),³ and its future as an independent economic unit was at an end.

Normar Transport Corp., an affiliate of Whitehall Company Ltd. ("Whitehall"), a wholesaler of alcoholic beverages, became interested in acquiring Granada's business if it were possible for Granada to retain the right to purchase and sell products of Almaden. To this end, it organized a subsidiary, Bilmar Inc., to attempt to make that acquisition by funding a plan of reorganization and, in the interim, it sought to provide working capital. Until shortly prior to confirmation of Granada's Plan, conditions were such that the Bankruptcy Court would not authorize any significant borrowing that would permit Granada to purchase and sell wines on the basis proposed by Bilmar. That basis contemplated, among other things, Granada's move to new premises and the performance by one or more of Whitehall and/or its affiliates of Granada's sales, warehouse, distribution and various administrative functions.

³ Tr. refers to the transcript of the proceedings of December 8, 1982, which is part of the record on appeal.

Shortly after the commencement of the proceedings, Granada's principal suppliers sought to terminate their relationships with Granada, and its principal supplier, Almaden, sought to have Granada liquidated. Initially, these companies opposed doing business with a Granada owned by Bilmar or Whitehall. For its part, Granada claimed that these suppliers were required to continue to sell goods to it. This issue became the subject of litigation and while that litigation was pending Bilmar was able to formulate a Plan of Reorganization. By virtue of the funds to be supplied by Bilmar under the Plan and Whitehall's commitments of future marketing efforts to those suppliers, Bilmar was able to persuade Granada's principal suppliers to continue to ship their products to Granada subsequent to confirmation of the Plan. On this basis the litigation was dismissed.

As ultimately developed, the Plan provided for the cancellation of all of Granada's outstanding stock and the acquisition by Bilmar of all of a new issue of Granada stock. (Plan, p.9; App. p. 60). Pre-confirmation stockholders were to receive nothing on account of their cancelled stock. (Id.) So far as is material to this Appeal, the Plan provided for a dividend of 30% on unsecured (Class Seven) claims, except that the Pension Fund was to receive 15% on the allowed amount of its claim in respect of withdrawal liability. (Plan, pp.8-9; App. p. 59-60) Thus, though this claim was included in Article II of the Plan in the category of Class Seven claims, which covered all pre-petition unsecured claims other than those referred to in the prior six

classes, in substance and effect the claim for withdrawal liability was treated in Article IV (d) (App. p. 59) of the Plan as a separate class from that of other unsecured creditors.

The 30% dividend to other unsecured creditors was premised on the assumption that the Pension Fund would receive that dividend on only one-half of its withdrawal liability claim; that is, that it would be treated under the Plan as it would be treated in a liquidation. Had it been determined that the withdrawal liability claim had to be treated in the context of a Chapter 11 pari passu with the claims of other unsecured creditors, the assets and contracts of Granada would probably have been purchased in a Chapter 7 liquidation. An alternative Plan might have provided for less than a 30% dividend to unsecured creditors and the Pension Fund. However, such a Plan may have been incapable of being lawfully confirmed since such equal treatment would mean that unsecured creditors other than the Pension Fund would thereby receive less than they would have received in a Chapter 7 liquidation as a consequence of the clearly limited participation of the withdrawal liability claim in such a liquidation. (D.S., 14, 15; App. pp. 38, 39). This result would violate Bankruptcy Code § 1129(a)(7)(A).

As indicated in the Disclosure Statement and in the Addendum thereto, the Plan contemplated that Granada was to emerge from Chapter 11 without substantially all of its employees and would rely instead on the marketing, warehousing, distribution and administrative staff of its new affiliates. Indeed, one of the

reasons for the withdrawal by the Teamsters Union, which represented most of Granada's former employees, of its objection to Granada's rejection of the union contract and Granada's obligations thereunder to contribute to the Pension Fund was that Granada would not be employing any "drivers or employees performing work that was within the scope of the Union contract..." after confirmation. (D.S., addendum, p.1; App. p. 85)

On December 2, 1982, and after it had participated in the hearing on the Disclosure Statement and raised no objection to the treatment of its claim for withdrawal liability, the Pension Fund filed an Objection to Confirmation of the Plan. In pertinent part, that Objection asserted that Granada had no legal justification for providing in the Plan that the Pension Fund, in satisfaction of its withdrawal liability claim, receive 15% of that claim in satisfaction thereof while the other unsecured claimants received 30% of their allowed claims. Specifically, the Objection stated that the 50% reduction of the withdrawal liability claim was not proper pursuant to ERISA §4225(b), 29 U.S.C. §1405(b), since Granada was not "undergoing liquidation or dissolution" within the meaning of that provision.

A hearing was held on the Confirmation of Granada's Amended Plan on December 8 and 10, 1982, and oral argument and testimony were heard on the Pension Fund's Objection. On December 23, 1982, the Bankruptcy Court confirmed Granada's Plan of Reorganization but expressly reserved a decision on the Fund's Objection. On January 2, 1983, the Bankruptcy Court issued its Memorandum On

Objection Of New England Teamsters And Trucking Industry Pension Fund To Confirmation Of Amended Plan Of Reorganization, finding that "the Fund is entitled to receive the same distribution on its claim as the other general unsecured creditors." Granada sought leave to appeal that decision and such leave was granted by the District Court which affirmed the Bankruptcy Court in its Memorandum and Order of May 17, 1984. This appeal was then taken.

ARGUMENT

Summary of Argument

It is respectfully submitted that the decision of the District Court as reflected in its Memorandum and Order should be reversed on a number of grounds.

First, the withdrawal liability provisions of the Multiemployer Pension Plan Amendment Act of 1980 (MPPAA), as applied to Granada, violate Granada's rights under the Fifth Amendment. Not only do they effect a "taking" of Granada's property without just compensation in violation of the Taking Clause of the Fifth Amendment, they operate to vary the terms of Granada's collective bargaining agreement by imposing on Grenada unavoidable and additional contribution obligations beyond those bargained for in its contracts and thereby violate Granada's due process rights under the Fifth Amendment. Furthermore, the imposition of withdrawal liability on an insolvent employer undergoing Chapter 11 reorganization is both an irrational and arbitrary means of effectuating the legislative purpose of the MPPAA, namely keeping pension funds healthy

by encouraging employers to join multiemployer plans. Not only does the imposition of withdrawal liability in the reorganization situation actually frustrate, rather than further, the purposes of the MPPAA, it also directly contravenes the Congressional policy favoring reorganization under Chapter 11 by creating a financial incentive to opt for liquidation or dissolution.

Second, even if the imposition of withdrawal liability on Granada were constitutional, the District Court's decision that Granada must pay a dividend on 100% of that liability undermines the unambiguously expressed policy of Congress in favor of reorganizations as distinguished from liquidations. That policy requires, in light of Granada's insolvency, the deficiency in the recovery of the claims of other unsecured creditors and the fact that Granada's pre-confirmation stockholders receive nothing, that the limitation of the withdrawal liability as set forth in ERISA Section 4225(b) should be applied as provided in the Plan.

Third, because of the nature of Granada's Plan of Reorganization, in particular the fact that the assets of the corporation were disposed of through a transaction which resulted in the full value of Granada's assets being distributed to creditors who received less than their full claim while stockholders received nothing, the District Court and the Bankruptcy Court were clearly erroneous in failing to find that in substance and effect the Plan called for a liquidation of Granada. By so failing to recognize the Plan as a liquidation of Granada, the court ignored the policy underlying ERISA Section 4225(b) which limits the Pension Fund's recovery on its withdrawal liability claim.

Finally, since the Plan treats the Pension Fund's claim for withdrawal liability as a separate class, does not discriminate unfairly against that class and is fair and equitable to that class, the Plan's provision for payment of a dividend on only one-half of that withdrawal liability claim is both legal and permissible pursuant to Section 1129(b) of the Bankruptcy Code.

- I. THE REQUIREMENT OF THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT THAT GRANADA PAY A PORTION OF THE UNDER-FUNDED CONDITION OF A PENSION PLAN IT DID NOT CREATE, CONTROL OR MANAGE CONSTITUTES A TAKING OF PROPERTY IMPERMISSIBLE UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Multiemployer Pension Plan Amendments Act ("MPPAA") became law on September 26, 1980. For purposes of this case, the most significant feature of MPPAA is the liability it imposes on employers who withdraw from multi-employer plans: under MPPAA, "an employer that withdraws must immediately begin to pay a fixed and certain debt owed to the plan." Peick v. Pension Benefit Guaranty Corporation, 539 F. Supp. 1025, 1033 (N.D. Ill. 1982), aff'd 724 F. 2d 1247 (7th Cir. 1983) cert. pending No. 83-1246. This debt represents the employer's share of the plan's "unfunded vested benefits" -- that is, the actuarial present value of vested benefit obligations minus the value of the plan's assets -- as calculated under one of four statutorily approved methods set forth at 29 U.S.C. §1391. Id. at 1033-34.

The statute which determines the amount of such withdrawal liability, ERISA Section 4225, 29 U.S.C. §1405, provides for different withdrawal liabilities depending on whether the trans-

action is a sale (4225(a)) or a liquidation or dissolution (4225(b)). Section 4225(a), by its terms, is inapplicable to employers "undergoing reorganization under Title 11". ERISA Section 4225(b), 29 U.S.C. §1405(b), provides, however, that in the case of an "insolvent employer undergoing liquidation or dissolution" the unfunded vested benefits allocable to that employer shall not exceed (1) 50% of the unfunded vested benefits allocable to the employer, plus (2) so much of the remaining 50% of the employer's share of unfunded vested benefits as does not exceed a defined net liquidation value of the employer.⁴ Under Section 4225(b), "liquidation value" is the value of the employer's assets minus its liabilities (not including any withdrawal liability imposed under this section). Soble, Bankruptcy Claims of Multiemployer Pension Plans, 33 Labor L.J. 57, 60 (1982).

⁴ Section 4225 was added to ERISA by MPPAA. Section 4225(b), 29 U.S.C. §1405(b), provides:

(b) In the case of an insolvent employer undergoing liquidation or dissolution, the unfunded vested benefits allocable to that employer shall not exceed an amount equal to the sum of--

(1) 50 percent of the unfunded vested benefits allocable to the employer (determined without regard to this section), and

(2) that portion of 50 percent of the unfunded vested benefits allocable to the employer (as determined under paragraph (1)) which does not exceed the liquidation or dissolution value of the employer determined--

(A) as of the commencement of liquidation or dissolution, and

(B) after reducing the liquidation or dissolution value of the employer by the amount determined under paragraph (1).

A. THE MPPAA'S WITHDRAWAL LIABILITY PROVISIONS EFFECT
A TAKING WITHOUT JUST COMPENSATION IN VIOLATION
OF THE FIFTH AMENDMENT.

The Fifth Amendment to the Constitution of the United States not only prohibits the deprivation of property without "due process of law," it also proscribes the "taking" of private property for public use without the payment of just compensation to the property owner. As recognized by the Supreme Court in Armstrong v. United States, 364 U.S. 40, 49 (1960), "the Fifth Amendment's guarantee is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." While the Supreme Court has been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons, it has identified several factors that have particular significance when a Court is engaging in the ad hoc, factual inquiry under the Taking Clause. Goldblatt v. Hempstead, 369 U.S. 390, 594 (1962); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). A court should focus on the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. Although a "taking" may perhaps more readily be found when the interference with property can be characterized as a physical invasion by

government, an interference arising from a public program adjusting the benefits and burdens of economic life may also constitute a "taking" in certain circumstances. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

1. Under the Precedents Established by the Supreme Court Granada's Contractual Right to Limited Liability to the Pension Fund Constitutes Property for Purposes of the Fifth Amendment.

The Supreme Court, in cases such as Arnett v. Kennedy, 416 U.S. 134 (1974) and Goldberg v. Kelly, 397 U.S. 254 (1970), defined "property" for purposes of the Fifth Amendment broadly to include rights which at common law would have been deemed contractual in nature. Even more unequivocal on this point was the Supreme Court's pronouncement in Lynch v. United States, 292 U.S. 571, 579 (1934), that under the Fifth Amendment, "valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States." In fact, if the Supreme Court had doubted whether an employer's existing contractual provision limiting its pension fund contribution liability was not a valid property interest for purposes of the Fifth Amendment, it would not have decided the due process claim against the MPPAA withdrawal liability provisions that was asserted in PBGC v. R.A. Gray & Co., 52 U.S.L.W. 4819 (1984).

Granada was a party to a contract with the Union which limited Granada's obligations in respect of the Pension Fund to specific bargained for contributions for each of its employees who were beneficiaries of that Pension Fund. Granada's contrac-

tual right to a limited pension fund contribution liability, part of the consideration for signing the collective bargaining agreement with the Union, constitutes property protected under the Taking Clause.

Several Circuit Courts of Appeal have erroneously interpreted the Supreme Court's holdings in United States v. Security Industrial Bank, 459 U.S. 70 (1982), and Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), as creating a dichotomy between property rights, protected by the Taking Clause, and contractual rights, not so protected. See, e.g., Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1276 (7th Cir. 1983), cert. pending, No. 83-1246; Republic Industries v. Teamsters Joint Council, 718 F. 2d 628, 639 (4th Cir. 1983), cert. pending, No. 83-541. A close reading of the Supreme Court cases, however, reveals that the Supreme Court continues to recognize contractual rights bound up with the reasonable expectations of the claimant as "property" within the meaning of the Fifth Amendment. To be sure, appellant's contractual right to retain funds it might have otherwise had to contribute to the pension plan is a different kind of property interest than that of an owner in fee simple of real property. However, neither logic nor case law supports the proposition that such differences relegate Granada's interest to something less than property. Indeed, the Supreme Court has explicitly recognized that governmental interference with contract rights may constitute an unconstitutional taking. See, e.g.,

agreements, thereby "taking" contract rights, the statute has also effectively confiscated a substantial part of appellant's assets. Furthermore, the MPPAA has interfered with and, in fact, completely frustrated the investment-backed expectations of appellant with respect to pension plan liability. As the Supreme Court held in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, (1922), a statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking".

While not every destruction of or injury to a property interest by governmental action constitutes a "taking" in the constitutional sense, an examination of the character of the invasion demonstrates that a compensable taking has occurred here. The purpose underlying the withdrawal liability provisions of the MPPAA was to lift the financial burden of financing the multiemployer insurance program from PBGC, a public agency, and place it on contributing employers, and not on all contributing employers, but only those who withdrew from the Fund.⁵ See, e.g., MPPAA Section 3(a)(2):

it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will ... contain program costs within reasonable limits.

⁵ After a withdrawing employer pays his share of the under-funding, market conditions or changes in benefits may eliminate or mitigate the under-funding with the result that employers who continue to participate for a time may withdraw without liability. That an employer may have had to withdraw as a consequence of financial problems and pay the liability which later may not exist only aggravates the inequity of the MPPAA.

Armstrong v. United States, 364 U.S. 40 (1960)(contract rights of materialmen were taken by the government without just compensation). As the Supreme Court has repeatedly emphasized, the term "property" as used in the Taking Clause is not used in the "vulgar and technical sense of the physical thing with respect to which the citizen exercises rights recognized by law. Instead, it denotes the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it ... The constitutional provision is addressed to every sort of interest the citizen may possess." United States v. General Motors Corp., 323 U.S. 373, 377-378 (1945) (emphasis added). Appellant's right to possess, use or dispose of assets contractually sheltered from pension fund claims is clearly a property interest worthy of protection under the Taking Clause.

B. Application of the MPPAA Withdrawal Liability Provisions to Granada Constitutes a Taking Within the Meaning of the Fifth Amendment.

When one applies to the case at bar the factors enunciated by the Supreme Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), as relevant in determining whether there has been a Taking Clause violation, the conclusion is inescapable that the MPPAA withdrawal liability provisions effect a "taking" of appellant's property within the meaning of that constitutional provision. The challenged government regulation has had an adverse economic impact on Granada. Not only has the statute destroyed the contractual limitations of liability on which Granada relied in entering into its collective bargaining

In fact, the PBGC, in its report to Congress submitted on July 1, 1978, stated that if all troubled pension plans were to terminate, it could cost the insurance system about \$4.8 billion to fund all plan benefits covered by Title IV's guarantee. Pension Benefit Guaranty Corporation, Multiemployer Study required by P.L. 95-214, at 2, 16, 139 (1978). As the Supreme Court has stated in numerous cases, government actions that may be characterized as acquisitions of resources to permit or facilitate public functions have often been held to constitute "takings". See, e.g., United States v. Causby, 328 U.S. 256 (1946); Portsmouth Co. v. United States, 260 U.S. 327 (1922); United States v. Cress, 243 U.S. 316 (1917). The MPPAA effects a taking of employer property by statute to relieve the financial burden on the government (and, indeed, unions) of meeting pension liabilities accrued by underfunded multiemployer plans. Such governmental action is fairly characterized as an acquisition of resources to permit or facilitate the public function, under Title IV of ERISA, 29 U.S.C. §§ 1301-1381 (1976), of guaranteeing that vested retirement benefits will actually be received by employees and their beneficiaries. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 375 (1980).

Although one of the asserted purposes of the MPPAA is to discourage voluntary withdrawals from pension plans, the only justification for imposing withdrawal liability in the case of involuntary withdrawal due to insolvency is to buttress the income of the fund and relieve the pressure on the federal insurance system.

The Fifth Amendment prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). Clearly, the \$248,614 of withdrawal liability assessed against Granada is more than its just share of the government's burden of guaranteeing actual receipt by employees of vested benefits in underfunded pension plans. Granada has already paid all or a claim has been made for all that it was obligated to pay under the collective bargaining agreement. Granada has thus been forced to surrender something more from that exacted from other employers, who must only meet their contractual contribution obligations. Granada is forced to surrender more than employees and unions whom the MPPAA saves harmless from any responsibility and accountability in protecting employee pensions. It is irrational and grossly inequitable that the burden of underfunded pension plans should be borne by employers forced to withdraw from plans because of financial disaster and not as well by unions and employees and the public as a whole. Therefore, this Court should hold that the MPPAA withdrawal liability provisions have effected a taking of appellant's property for which there must be just compensation.

3. The Fifth Amendment Mandates that Granada Receive Just Compensation for the Property Taken Through Application of the MPPAA to Granada's Withdrawal from the Pension Plan.

The Fifth Amendment does not allow simply an approximate

compensation, but requires a full and perfect equivalent for the property taken. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893); United States v. Pewee Coal Co., 341 U.S. 114, 117 (1951). Appellant's involuntary withdrawal from the pension plan gave rise to a \$248,614 withdrawal liability above and beyond that which appellant had contractually agreed with the Teamsters Union to contribute to the Fund. Furthermore, there is no merit to the contention of two Circuit Courts that employers, at the time withdrawal liability is assessed against them, have already received full compensation in the form of employee services. See, e.g., Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502, 1510 (D.C. Cir. 1984); Textile Workers Pension v. Standard Dye Finishing, 725 F. 2d 843, 857 (2nd Cir. 1984) cert. den. sub nom Sibley, Lindsay & Curr Co. v. Bakery Confectionary, 52 U.S.L.W. 3920. Those courts reasoned that the unfunded liability incurred by withdrawing employers is equal to the bargained-for benefits, in the form of employee services, already received by them in exchange for their promises to fund pension benefits. However, it is simply incorrect to view pension benefits as the quid pro quo for employee services. Employees' services are provided only in part in exchange for an entitlement to pension benefits. The employer is required to give up much more than pension contributions to obtain those services. The employer must provide, inter alia, wages, training, health and accident

benefits, and vacation time. In return, the employer bargains for more than just the receipt of services. He bargains for a return on the investment he made in training the employee in the form of a commitment to the employer for a certain amount of time. He also bargains for stability and continuity in his employment relationships. However, when the employer is forced to withdraw from a pension plan because of a financial crisis requiring reorganization, sale, or closing, not only does he not receive a significant part of the benefits for which he bargained, he also incurs an additional obligation to fund the difference between the amount of benefits promised by the Pension Fund trustees and that which can be realistically funded by his contractually determined employer contributions. The Supreme Court itself has noted that potential pension benefits are, "a relatively insignificant part of an employee's total and indivisible compensation package." International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 560 (1979).

The Fifth Amendment does not simply require some compensation when property is taken for a public purpose. Rather, the Fifth Amendment demands that the compensation be a full and perfect equivalent for the property taken. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). The federal pension insurance system may be in a precarious financial state. Congress may wish to reduce the burden on the federal budget of buttressing underfunded pension

funds. Congress may believe that the costs of guaranteeing benefits at a level set by trustees rather than at a level corresponding to employers' contract-based expectations may be borne more easily by withdrawing employers such as appellant than by overburdened taxpayers. But those Congressional concerns do not allow this Court to ignore past precedents construing the Taking Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change. This Court must recognize the danger of permitting Congress, in the guise of "regulation", to confiscate significant portions of Granada's and other withdrawing employers' assets for that purpose without providing just compensation. Therefore, this Court should hold that the MPPAA withdrawal liability provisions violate the Taking Clause of the Fifth Amendment.

B. THE WITHDRAWAL LIABILITY PROVISIONS OF THE
MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF
1980 VIOLATE GRANADA'S FIFTH AMENDMENT DUE
PROCESS RIGHTS.

Application of the MPPAA to vary the terms of appellant's collective bargaining agreement with the Teamsters Union violates the Due Process Clause of the Fifth Amendment. While the principles embodied in the Fifth Amendment's Due Process Clause are not coextensive with prohibitions existing against state impairments of pre-existing contracts, see PBGC v. R.A. Gray & Co., 52 U.S.L.W. 4810 (1984), it is clear that arbitrary and irrational legislation which impairs private contract rights cannot withstand judicial scrutiny under the Due Process Clause. Usery v. Turner Elkhorn

Mining Co., 428 U.S. 1 (1976). The MPPAA imposes on Granada an obligation to pay for unfunded benefits upon withdrawal from the multiemployer pension plan, notwithstanding that its collective bargaining contract imposes no such liability. While Congress is given wide latitude in the area of national economic policy to adopt legislation adjusting the burdens and benefits of economic life, such legislation must be supported by a legitimate legislative purpose furthered by rational means. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 487-488 (1955). It is submitted that application of the MPPAA to Granada's involuntary withdrawal violates Granada's due process rights and that the failure of Congress to include reorganization under Chapter 11 of the Bankruptcy Code as a basis for exemption from the operation of the MPPAA withdrawal liability provisions (ERISA, §4225(a)) is irrational and arbitrary and thus violative of the Fifth Amendment.

1. Application of the MPPAA to Granada's Involuntary Withdrawal From the Pension Plan Violates Granada's Due Process Rights Under the Fifth Amendment to the Constitution.

Application of the MPPAA to vary the pension benefit provision of Granada's existing collective bargaining agreement with the Teamsters Union implicates the Due Process Clause of the Fifth Amendment. The MPPAA withdrawal liability provisions, as applied to the facts of this case, are irrational and arbitrary and therefore cannot survive due process scrutiny. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). Congress' chosen solutions to the problems posed by multiemployer pension plans

are, with respect to the case at bar, irrational and arbitrary solutions to the problems identified and are thus constitutionally impermissible.

In enacting the MPPAA, Congress sought to eliminate the financial incentives to voluntary withdrawal from pension plans and to shift the financial burden of supplementing the Pension Fund's income from the federal government to withdrawing employers. See, e.g. MPPAA § 3(a)(2); P.B.G.C., Multi-employer study required by P.L. 95-214, at pp. 2, 16, 139 (1978). Congress reasoned that the withdrawal liability provisions were a rational means of allocating the cost of providing funds in excess of negotiated contributions to multiemployer plans whose future pension commitments had only been partially funded by employer contributions, albeit funded at the level accepted by the employees and their representatives and required by contract. Congress also reasoned that such costs were properly imposed on withdrawing employers because, at the time of withdrawal, they had already received the benefit of employees' services and thus should be liable for the unfunded vested benefits of such employees. See, e.g. Textile Workers Pension v. Standard Dye & Finishing, 725 F. 2d 843, 849, 857 (2d Cir. 1984); Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502, 1505, 1510 (D.C. Cir. 1984).

However, such reasoning is irrational on two grounds. First, the withdrawal liability imposed by the MPPAA is totally unrelated to both the existence and the amount of a given fund's

liability for unfunded vested benefits. The underfunding is a product of factors wholly outside the control of the contributing employer. It is attributable to benefit levels, set by trustees, that bear no reasonable relation to the aggregate amount of employer contributions required to be made under present collective bargaining agreements and those contributions expected to be made in the future. Similarly, under MPPAA a fund may manipulate interest rates or increase benefit levels prior to an anticipated withdrawal, voluntary or involuntary, and thereby increase the withdrawing employer's withdrawal liability and, in effect, require that employer to fund benefit improvements for the remaining plan participants. Imposition of non-negotiated, uncontracted-for liability on such an irrational and arbitrary basis cannot withstand judicial scrutiny.

Second, the share of the Fund's unfunded vested benefits "allocated" to withdrawing employers is not limited to or even reasonably related to the under-funding attributable to the vested benefits due to the employers' own employees. Nor is it rationally related to the value of employee services already received by such employers in exchange for pension benefits that have vested at the time of withdrawal. As heretofore noted, Pension benefits comprise only a small part of an employee's total compensation, particularly with respect to industries characterized by mobile employment and strict vesting requirements. The Supreme Court itself has recognized that in the context of multiemployer plans, potential pension benefits are a relatively

insignificant part of an employee's total and indivisible compensation package.

Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits... His decision to accept and retain covered employment may have only an attenuated relationship, if any, to perceived investment possibilities of a future pension. Looking at the economic realities, it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.

International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 560 (1979).

Imposing on withdrawing employers liability for unfunded vested benefits on the theory that such liability is the quid pro quo for employee services already received is clearly arbitrary and grossly inequitable in the case of involuntary withdrawal by insolvent employers such as Granada. This is particularly so where unions and their members bear no share of the responsibility for such under-funding.

Moreover, in the case of Granada, an insolvent employer forced to cease business operations, terminate employees and withdraw from the plan, it is manifestly evident that it has not and never will receive the full benefit for which it bargained. Imposition of withdrawal liability on Granada simply cannot be justified as the quid pro quo for benefits already received. Therefore, the instant case is plainly distinguished from the situation presented in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1977), in which the Supreme Court upheld a statute requiring coal companies to pay black lung benefits to former employees.

In Turner, liability was properly characterized as an actual cost of an employer's own business. Furthermore, it could fairly be said that liability was directly related to benefits actually received by the employer from the specific employee compensated and to injuries actually caused by working conditions over which the particular employer had control.

In contrast, appellant had no control over pension plan underfunding. Neither did appellant have within its control a means of changing its conduct so as to avoid withdrawal liability. In fact, the only means available to appellant to control pension benefit liability was to limit such liability through negotiations with the Teamsters Union and the resulting collective bargaining contract. The MPPAA withdrawal liability provisions, however, have operated to undermine even that limited control by varying the terms of appellant's contract. The Due Process Clause of the Fifth Amendment requires, at the very least, that burdens imposed on a select group of individuals bear some reasonable relation to benefits actually received. Furthermore, the legislative purpose of supplementing pension fund incomes by allocating the additional costs of employee's pension benefits to those who have profited from such employee's services must be furthered by non-arbitrary, rational means. Application of the MPPAA to appellant's involuntary withdrawal from the pension plan clearly cannot meet this Due Process requirement. Accordingly, this Court should hold that the MPPAA withdrawal liability provisions violate the Due Process Clause of the Fifth Amendment.

2. The Congressional Omission of Chapter 11 Reorganizations From the Ambit of ERISA §4225's Limitation on Withdrawal Liability is Irrational and Arbitrary and thus Violative of the Fifth Amendment.

One of the primary problems Congress identified under ERISA was that the statute encouraged employer withdrawals from multi-employer plans. Congress was concerned that the entire burden of supplying the additional funds needed to provide employees with benefits at the level set by the trustees, which were far in excess of that which could reasonably be funded by contractually determined employer contributions, would fall on the federal insurance system. To avoid this potential financial burden and to further more effectively the purposes of ERISA, e.g. ensuring that employees receive anticipated retirement benefits, Congress enacted MPPAA. By virtue of the withdrawal liability provisions of that Act, Congress has successfully placed the financial burden of underfunded plans on withdrawing employers, created a financial disincentive to voluntary withdrawal, and protected remaining employers against increased costs arising from voluntary withdrawals. PBGC v. R.A. Gray & Co., 52 U.S.L.W. 4810 (1984). The fact that the MPPAA withdrawal liability provisions were primarily aimed at employers who withdrew voluntarily from pension plans as a cost-saving move is evidenced by the provisions limiting withdrawal liability in the case of sale, liquidation or dissolution (ERISA, §4225), obvious instances of involuntary withdrawal. Also, see PBGC, Recommendations to the Congress for Revising Multi-employer Plan Termination Insurance, at 16 (February, 1979). It

was certainly rational for Congress to conclude that the operation of the withdrawal liability provisions as a disincentive to withdrawing would be ineffective in the case of involuntary withdrawals. Similarly, imposition of withdrawal liability in the case of an insolvent employer would be an irrational means of effectuating the purposes of the MPPAA -- guaranteeing employees their retirement benefits by encouraging employers to continue to participate in plans. But conspicuously absent from the MPPAA is a provision limiting withdrawal liability in the case of an insolvent employer undergoing reorganization under Chapter 11 of the Bankruptcy Code. Indeed, the limitation on withdrawal liability in the case of sales contained in ERISA § 4225(a) is expressly made inapplicable to reorganizations. The failure of Congress to limit withdrawal liability in reorganization situations, particularly those characterized by the employer's insolvency, renders the application of the MPPAA to such situations irrational and arbitrary, and thus violative of the Due Process Clause of the Fifth Amendment.

In the case at bar, appellant filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on April 1, 1982. Because of appellant's severely distressed financial condition, it was forced to cease normal business operations and terminate all but four of its employees. The termination of its truckers and salesmen, who were covered by collective bargaining agreements with the Teamsters Union, gave rise to the claim for withdrawal liability by the Pension Fund in the amount of \$248,614. Granada

did not withdraw from the pension plan voluntarily and therefore had no opportunity to conform its conduct so as to avoid withdrawal liability. Furthermore, if Congress was concerned with creating financial disincentives to withdrawal in enacting the MPPAA, its effectiveness to that end was non-existent in the case of appellant's forced withdrawal. Penalizing insolvent employers and their unsecured creditors for involuntarily withdrawing from pension plans is not a rational means of ensuring that pension funds remain healthy and employers continue to join or participate in multiemployer pension plans. In fact, by penalizing employers undergoing reorganization, the MPPAA creates an additional incentive for employers, apart from the threat of withdrawal liability for voluntary withdrawals, to decline to join multiemployer plans in the future.

Yet the irrationality and arbitrariness of Congress' failure to limit the withdrawal liability of employers, such as Granada, undergoing reorganization, goes even further. Not only does the MPPAA's assessment of full liability in reorganization situations bear no relationship to the purposes of that Act, it also frustrates, and, in fact, directly contravenes the unambiguous Congressional policy favoring the reorganization of insolvent companies evidenced in the Bankruptcy Code. Ironically, if that "bias" in favor of reorganizations were recognized by a limitation of withdrawal liability in a case such as the use at bar, where the creditors receive less than full payment and the stockholders receive nothing under the Plan (and thus cannot benefit from the limitation),

the purposes of the MPPAA would at least be served by the opportunity for resumed participation in the plan which such reorganization makes possible at some future time. In such circumstances, to insist on a formal liquidation as a condition to limiting the withdrawal liability is both irrational and counter-productive.

II. THE BANKRUPTCY CODE AND CONGRESS'S POLICY IN FAVOR OF REORGANIZATIONS UNDER CHAPTER 11 REQUIRE, IN THESE CIRCUMSTANCES, THAT THE PENSION FUND'S CLAIM AGAINST GRANADA ON ACCOUNT OF WITHDRAWAL LIABILITY BE TREATED UNDER GRANADA'S PLAN ON THE SAME BASIS AS IT WOULD BE TREATED UNDER CHAPTER 7.

The Bankruptcy Code of 1978, 11 U.S.C. §§101-151326, enacted November 6, 1978, provides two major avenues of relief for corporate debtors: a liquidation proceeding under Chapter 7 and a proceeding under Chapter 11 which is primarily intended for reorganization but which may be and often is availed of for liquidation through the medium of a plan of reorganization. The policy of Congress, unambiguously reflected in the Bankruptcy Code, favors reorganization. This policy is based on the well-recognized fact that "[i]t is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." In re Bildisco, 682 F.2d 72, 77 (3d Cir. 1982) aff'd sub nom NLRB v. Bildisco & Bildisco, 52 U.S.L.W. 4270 (1984), quoting H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 220 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6179. Moreover, experience under the old Bankruptcy Act demonstrated that creditors recover larger portions of their claims in reorganization proceedings than in straight liquidation proceedings. 682 F.2d at 77 n.6. To assure, however, that reorganizations under chapter 11 are not misused, Congress provided, in §1129(a)(7)(A), that:

The court shall confirm a plan only if all of the following requirements are met:

(7) With respect to each class--

(A) each holder of a claim or interest of such class

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date;

. . .

Thus, absent achieving the very difficult task of securing acceptance of a plan by each and every creditor in a class of creditors, the plan must provide that each creditor receive under the plan as much as it would receive under Chapter 7, if the plan is to be capable of confirmation.

As previously discussed, ERISA section 4225 provides for different withdrawal liabilities depending upon whether the withdrawal is the result of a sale (4225(a)) or a liquidation or dissolution (§ 4225(b)). In the latter case, the withdrawal liability claim is limited to 50% of the unfunded vested benefits attributable to the employer plus so much of the remaining 50% as does not exceed a defined net liquidation value. However, if a pension fund is to be treated under the plan of reorganization of an insolvent debtor on the same basis as other unsecured creditors, while under Chapter 7 it would receive a dividend on only half its claim, plans proposing to give all unsecured creditors dividends

approximating their pro-rata share of the estimated liquidation value of the debtor's assets would be incapable of confirmation, since all unsecured creditors other than the pension fund would receive more in a Chapter 7 case. Thus, in many cases of insolvent debtors where there is a claim for withdrawal liability and other unsecured creditors are to receive less than full payment under the plan, a construction of Section 4225(b) of ERISA to require pari passu treatment of the withdrawal liability claim with other unsecured claims would raise a bar to confirmation of a plan of reorganization under § 1129(a)(7)(A). Such an outcome cannot have been the intent of Congress. Where the debtor is insolvent and under a reorganization plan other unsecured creditors receive less than full payment on their claims and stockholders receive nothing on their stock interests, the policy considerations which give rise to the § 4225(b) limitations of liability are served and that section should be applied to permit the participation of the pension fund only to the extent of one-half its claim for withdrawal liability. In adopting the limitation, Congress obviously was moved by the impact of withdrawal liability on other parties in interest. If the impact of withdrawal liability which prevails in a reorganization is characteristic of the impact in a liquidation, there is no reason to treat the two situations differently as far as the limitation of the liability is concerned. In such circumstances, which are present in this case, logic and reason dictate that Congress intended that the Pension Fund would only have a claim for 50% of the withdrawal

liability. Such an interpretation of §4225(b) is not only logical and reasonable but also is necessary to avoid what would otherwise be a substantial conflict between the MPPAA and the Bankruptcy Code and a thwarting of Congressional purpose. It is unquestionably within the discretion of this Court to interpret and apply the MPPAA to avoid a conflict with the Bankruptcy Code, particularly when that application honors the concern of Congress in adopting the limitation on withdrawal liability. See, e.g., Commissioner v. Brown, 380 U.S. 563, 571 (1965).

III. GRANADA HAS UNDERGONE A LIQUIDATION WITHIN THE MEANING AND INTENT OF §4225(b) OF ERISA AND THEREFORE THE PLAN PROPERLY PROVIDED FOR A DIVIDEND ON HALF THE WITHDRAWAL LIABILITY CLAIM.

Even if this Court is unwilling to over-rule the District and Bankruptcy Courts' failure generally to apply ERISA §4225(b) to a Chapter 11 plan in the circumstances above set forth, it is clear that both lower courts committed reversible error in not determining that Granada has undergone a liquidation within the meaning and intent of ERISA Section 4225(b).

Both lower courts should not have interpreted the word "liquidation" in that statute or the term "wind up" referred to in the Senate Committee Report⁶ with respect to that statute so narrowly as to exclude from the ambit of those words the facts prevailing with respect to Granada in this matter simply because Granada was not undergoing a Chapter 7 "liquidation". Courts have noted in cases involving ERISA and the old Bankruptcy Act that:

⁶ Joint Explanation §5b, 126 Cong. Rec. §10111, §10117, (Daily Ed., July 29, 1980).

[t]he meaning of a term in another context in other legislation is inappropriate to the construction of the term in the Bankruptcy Act. The latter has its own purposes in achieving societal good. It has its own policy and the objects of Congress' concerns in such Act are not necessarily at one with the objects of Congressional solicitude in another.

In Re International Automated Machines, 13 B.R. 119, 121 (Bkrcty.-N.D. Ohio 1981), quoting Matter of Standard Cellulose & Novelty Co., Inc., 14 C.B.C. 63 (Bkrcty.-S.D.N.Y. 1977). Such consideration is applicable to the Bankruptcy Code. Simply stated, the Court may properly and should construe the word "liquidation" in §4225(b), as commented on in the Senate Committee Report, broadly and flexibly to fulfill the unambiguous Congressional policy favoring reorganization.

There is no question but that Granada was insolvent within the meaning of §4225(b)⁷ (Tr. pp. 28-43 and 46-51; App. pp 120-135 and 138-143; Finding and Order Confirming Plan of Reorganization, p. 3, App. p. 89). Thus the only issue with respect to §4225(b) is whether Granada is "undergoing liquidation or dissolution," through and in connection with the Plan. As a matter of statutory construction and Congressional intent, it plainly is.

The aforesaid Senate Committee Report on the ERISA §4225(b) limitation states, "to qualify for this rule, an insolvent employer need not undergo a formal liquidation or dissolution. It must, however, be insolvent and wind up its business affairs." Joint

⁷ For purposes of Section 4225(b), an employer is insolvent "if the liabilities of the employer, including withdrawal liability under the plan (determined without regard to subsection (b) of this section), exceed the assets of the employer determined as of the commencement of the liquidation or dissolution)[.]" §4225(d), 29 U.S.C. §1405(d).

Explanation §5b, 126 Cong. Rec. S. 10111, S. 10117 (Daily Ed., July 29, 1980). The Granada that commenced the Chapter 11 proceeding and that was indebted to the Pension Fund has, for all intents and purposes, been liquidated and has wound up its business. The Granada which has emerged from the Chapter 11 proceedings pursuant to the Plan is a corporation with entirely new stock, a new stockholder, a new management and new premises. It no longer has its own salesman, warehousemen, truckers or administrative staff. That it emerged with the name "Granada" and certain of the assets of the old Granada was the result of what in reality was a purchase of those assets by Bilmar from the creditors of Granada for a price equal to what was paid to creditors under the Plan.

What was in reality an asset transaction was accomplished in the form of a stock transaction under the Plan because initially it was thought that the latter approach might preserve contractual relationships with certain suppliers and because Granada believed in good faith and until it was too late to change the form of the transaction that the Pension Fund had accepted the reorganization plan's treatment of the withdrawal liability claim. That turned out not to be the case in both respects. To the extent that the new Granada was able to maintain those relationships it did so on the basis of the new consideration and commitments coming from the new owner. That the form of the transaction would create the problem represented by the Pension Fund's Objection herein was not contemplated because of actions of the Pension Fund itself.

At the time of the hearing on the Disclosure Statement, attended by counsel to the Pension Fund, no objection was made to the Plan's provision with respect to withdrawal liability. Indeed, the Pension Fund had requested that the Plan be clarified to show that its unsecured claims other than its withdrawal liability claim be treated pari passu with the claims of other unsecured creditors. That change was incorporated in the Plan and the Disclosure Statement which, in a number of places, referred expressly to the withdrawal liability claim and provided that it specifically would be treated on the same basis as in a liquidation as that term is used in ERISA §4225(b). (See, e.g., D.S. pp. 20, 26; App. pp. 44, 50 and Plan pp.3, 8, 9; App. pp. 55, 59 and 60) Had the Pension Fund objected to such treatment at that time, before solicitation of the Plan's acceptance, there would have been time within which to change the form of the transaction to avoid the Pension Fund's Objection that was subsequently filed a day or two prior to the hearing on confirmation and after the Plan had been accepted.

Despite all the relevant facts establishing the presence of a liquidation in the creation of a new corporate entity, as are reflected in the disclosure statement, the courts below failed to find a liquidation in this situation by opting for a narrow and formalistic definition of that word. It is respectfully submitted that, in taking this approach, the lower courts ignored the policy underlying ERISA §4225(b). What made legitimate and equitable the limitation on the Pension Fund's recovery as set forth in that Section were the undisputed facts that after a

distribution of the fair value of the Granada assets to creditors, with the Pension Fund participating on the 50% basis, other creditors received less than 100% of their claims and the stockholders of the debtor company received nothing. If the assets of the corporation are disposed of under those circumstances and distributed with that resulting deficiency, the Pension Fund's participation should be limited as provided in Section 4225(b). To allow a greater participation would permit what were known to be massive claims on account of under-funded pension funds⁸ to unfairly eat up assets available for satisfaction of, and thereby dilute the value of, the claims of other unsecured creditors. These policy considerations, operational in the case at bar, are the same which caused Congress to enact §4225(b). Since the full value of the assets of Granada have been distributed to creditors who are still receiving less than 100% of their claims even though the Pension Fund participates on the limited basis provided in Section 4225(b), since no assets of value have been distributed to or held for the benefit of Granada's stockholders, and since the new Granada is an entity with new stock, new employees, a new stockholder and new management, the aforesaid policy considerations should have been honored by the lower courts and the basic nature of this liquidation recognized.

⁸ Examples of such massive claims are Matter of Kessler, 23 B.R. 724 (Bkrcty. - S.D.N.Y., 1982)(\$4,347,640.19); Matter of Cott Corp., 26 B.R. 332 (Bkrcty. - D. Conn., 1982)(\$2,281,767.00); Matter of Food Fair, Inc. 14 B.R. 40 (Bkrcty. - S.D.N.Y., 1981) (\$4,000,000.00).

IV. SINCE THE PLAN TREATS THE PENSION FUND'S CLAIM FOR WITHDRAWAL LIABILITY AS A SEPARATE CLASS, DOES NOT DISCRIMINATE UNFAIRLY AGAINST IT, AND IS FAIR AND EQUITABLE, IT MAY PROVIDE FOR PAYMENT OF A DIVIDEND ON ONLY ONE-HALF OF THAT CLAIM PURSUANT TO §1129(b) OF THE BANKRUPTCY CODE.

Granada's reorganization plan treats the Pension Fund differently from other unsecured creditors by providing the payment under the Plan of a dividend on only one-half of the Pension Fund's withdrawal liability claim. Essentially the Fund is treated as a separate class. As noted above, this treatment is the same as would be accorded in a Chapter 7 liquidation except that on the facts of this case that 15% recovery is more than the Pension Fund would have received in a Chapter 7 liquidation. For this reason, the provision meets the test of §1129(a)(7) of the Bankruptcy Code even if the Pension Fund is deemed to have rejected the Plan. Moreover, even if the Pension Fund, as a class, is deemed to have rejected the Plan, the Plan may and should be confirmed pursuant to §1129(b) of the Code. That section provides in pertinent part as follows (emphasis added):

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

. . . .

(B) With respect to a class of unsecured claims--

- (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
- (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain on account of such junior claim or interest any property.

Contrary to the Bankruptcy Court's ruling, the Plan does not unfairly discriminate against the Pension Fund with respect to its withdrawal liability claim. Indeed, for purposes of a Chapter 11 plan where creditors are to receive less than 100% of their allowed claims and stockholders are to receive nothing, it is reasonable to classify a withdrawal liability claim separately from other unsecured claims, and, in fact, in those circumstances, that separate treatment is required by Section 1129(a)(7)(A)(ii) of the Bankruptcy Code. As previously discussed, that Section raises to a level of critical importance the question of what a creditor would receive in a Chapter 7 liquidation. If different unsecured creditors would be treated differently in a Chapter 7 liquidation, that difference provides a basis for separate classification and different treatment of such creditors. See e.g., In Re Sutherland, 3 Bankr. 420 (Bkrcty. - W.D. Ark. 1980). In short, a difference in the legal characteristics of claims in a Chapter 7 case, which is relevant to a reorganization plan by virtue of § 1129(a)(7)(A)(ii), provides a basis for fairly discriminating between those creditors. ERISA Section 4225(b), which provides that the withdrawal liability claim would receive

less than the other unsecured creditors in a liquidation, is the basis for both such a separate classification and the resulting discrimination between the withdrawal liability claim and the claims of other unsecured creditors in light of the requirements of Section 1129(a)(7)(A)(ii). Moreover, that discrimination is manifestly not unfair under §1129(b) because it is so mandated by those sections of ERISA and the Bankruptcy Code.

Since the Pension Fund's withdrawal liability claim is a separate class which is not the subject of unfair discrimination, §1123(a)(4) cited by the Bankruptcy Court (Memorandum, p. 5, App. p 148) is inapplicable. That section, which mandates similar treatment for members of the same class, must be read together with §1122(a), which requires that claims be placed in the same class only if they are "substantially similar." This standard is a codification of case law current at the time the Bankruptcy Code was passed and therefore pre-Code cases are relevant to an analysis of its effect. Matter of Martins Point Limited Partnership, 12 BR 721, 725 (Bnkrcy - N.D. Ga., 1981). Such a case is In Re Los Angeles Land & Investments, Ltd., 282 F. Supp. 448 (D. Haw. 1968), aff'd 447 F.2d 1366 (9th Cir. 1971), in which the court determined that unsecured creditors may be divided into separate classes where the legal character of their claims is such as to accord them a status different from other unsecured claims. In this case, the Pension Fund's different treatment in a chapter 7 rather than a chapter 11 is such a difference in legal character which requires separate classification. See

Bartle v. Markson. 314 F. 2d 303 (2d Cir. 1963)(Subordinated claims put in different classes.)

Practically, as well as legally, a separate classification of the Pension Fund's withdrawal liability claim is required. Since the Pension Fund will receive a dividend on only half the withdrawal liability claim in a liquidation, it is unlikely ever to vote against a reorganization in which it would receive a dividend on 100% of its claim, whether or not that reorganization is otherwise in the best interests of unsecured creditors. To protect the rights of the other unsecured creditors from being out-voted in such a situation by the large withdrawal liability claim that has different and conflicting interests, the withdrawal liability claim should be placed in a separate class as it was, for all intents and purposes, by Granada. See Plan Article IV(d); App. p. 59.

Since the Pension Fund's withdrawal liability claim should be and in substance was in a separate class, the only remaining issue is whether the claim's treatment by the Plan is fair and equitable. A determination as to that issue must be made in accordance with Section 1129(b)(2) of the Bankruptcy Code. Clause B of that Section (set forth above) provides that a Plan is fair and equitable with respect to a class of unsecured creditors who reject the plan if the holder of any junior claim or interest would not receive or retain any property on account of such junior claim or interest. That is the situation in the case at bar. Since no claim junior to the Pension Fund is receiving anything on its claims or interests and the Pension Fund is

getting at least what it would get in a Chapter 7 liquidation, there is no basis on which it can be said that the Plan is unfair or inequitable to it or unfairly discriminates against it. Thus, even if the Pension Fund's withdrawal liability claim, treated as a separate class, is deemed to have rejected the Plan by virtue of the Objection, the payment provided for in that Plan is permissible and the Plan should be confirmed.


It should be noted that the foregoing analysis and, in particular, the application of Section 1129(b)(2)(B) to this situation, does not mean that in every Chapter 11 case a pension fund withdrawal liability claim will be required to participate only to the extent of one half the claim. Under most Chapter 11 plans, existing stockholders will retain an interest even though unsecured creditors may receive less than 100% on their claims. In such cases, treatment of the withdrawal liability claim on the same basis as would occur in a Chapter 7 liquidation would not be fair and equitable under Section 1129(b). Further, it should be noted that such cases where stockholders continue to participate post-confirmation do not involve liquidations as this case does.

CONCLUSION

For all of the reasons set forth above, the Appellant Granada respectfully requests this Court to reverse the decisions of the District and Bankruptcy Courts and order either that the MPPAA as applied in this situation to Granada is unconstitutional or that the withdrawal liability claim of the Pension Fund be paid a

dividend on only one-half its allowed claim as provided in the
Plan.

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